IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902, No. 266.

ESTHER S. BUCHANAN ET AL.,
Plaintiffs in Error,

vs.

LAURA PATTERSON ET AL.,
Defendants in Error.

In Error to the Court of Appeals of Maryland.

REPLY OF PLAINTIFFS IN ERROR TO BRIEF OF DEFENDANTS IN ERROR.

It would, perhaps, be of assistance to the Court to note what seem to be certain inaccuracies of statement, or erroneous views, in the brief of the defendants in error.

I.

Point I of the defendants in error's argument is devoted to the effect of the statement in the opinion of the Court of Appeals of Maryland, quoted on page 11 of brief of defendants in error, as follows:

"*The whole record shows beyond question that she represented with their consent all the parties who are now claiming against her.*" (See also Record, page 99.)

So far from there being any intention on the part of the plaintiffs in error to negative this statement in any degree, it was expressly claimed on their behalf. But what is the effect of such statement? If Miss Buchanan filed her claim in the Court of Claims and urged it to the final award in that Court and collected the money, with the "full consent and authority of all the next of kin" of the defendants in error, (defendants' brief, page 11), did they not consent that she should urge it, as she did, on behalf of the next of kin of her own intestate equally, as on behalf of themselves? Did they not consent that she should take every step which she took in the Court of Claims, strictly in behalf of the right of her intestate, William B. Buchanan, as the surviving partner of the firm of which Samuel Smith, James A. Buchanan and himself were members? Did they not consent to every conclusion of law and finding of facts which she obtained in the Court of Claims, and which are enumerated in the brief of the plaintiffs in error, from page 9 to 16?

II.

Notwithstanding this finding of fact of the Maryland Court of Appeals, that the whole proceeding to obtain these awards in the Court of Claims was with the consent and authority of the defendants in error here, these defendants in their next point, (pages 12 to 15 of their brief), with strange inconsistency, endeavor to explain away the consequences of the fact, that the administrators of Samuel Smith and James A. Buchanan appeared in these proceedings side by side with Esther S. Buchanan, administratrix of William B. Buchanan, and took every step at the same moment with her, and shared in every finding which she obtained, by denying that they were in any way parties to that proceeding. In this connection it is only necessary to quote 1 Greenleaf on Evidence, sections 522–523, quoted and adopted by this Court:

"It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he is a stranger. But the converse of this rule is equally true, that by proceed-

ings to which he was not a stranger, he may well be bound. Under the term "parties," in this connection, the law includes all who are directly interested in the subject matter, and had a right to make defense or to control the proceedings; and to appeal from the judgment. This right involves, also, the right to adduce testimony and to cross-examine the witnesses adduced on the other side. Persons not having these rights are strangers to the cause. But to give full effect to the principle by which parties are held bound by a judgment, *all persons who are represented by the parties, and claim under them, or in privity with them, are equally concluded by the same proceedings.*"

See Lovejoy vs. Murray, 3 Wall. (70 U. S.) page 19, cited and affirmed in Robbins vs. Chicago, 4 Wall. 657, at page 672.

Therefore, besides the express authority given Miss Buchanan and her representation of them in accord herewith, the next of kin of Samuel Smith and James A. Buchanan in both claims were represented by the administrators of those worthies, and "claimed under them" and "in privity" with them. But more than that, their next of kin here claim expressly that the proceedings were taken only with their own consent, by their own counsel chosen to represent them; hence they "controlled" the proceedings. They did "adduce testimony" and "examined," or had the right to cross-examine, all the witnesses adduced by the administratrix of William B. Buchanan, and in fact they did adduce witnesses of their own in support of her claim, in the very method and by virtue of the very rights upon which she claimed and received her award, and yet they now claim to have had no lot or part in, and to be in no way bound by, these proceedings, which, in the same breath they have said, were taken only by their own express consent, and hence were under their own control.

The Court of Appeals of Maryland found it equally as a fact (by which finding, according to the defendants in error, this Court is bound), "that those parties who instituted the proceedings in the Court of Claims," "all the parties now

claiming against her," who consented to and authorized the proceedings in the form in which she instituted them, "made a mistake," and "the mistake made" "by those parties" "was in assuming that her intestate was a member of *the firm* as constituted at the time of the losses," "nor does it appear that this mistake was discovered until after the filing of the bill in this case." (Record, pages 101, 102, 99, 100.)

Therefore, the facts found by the Maryland Court of Appeals are, that all the conclusions of law and of fact appearing in the Findings of the Court of Claims and the action of Congress in strict accordance with those findings, were the result of the consent, authority and instructions to that effect, given this plaintiff in error, by the parties who are now here as defendants in error, whose own chosen counsel framed, in the name and for the benefit of the plaintiff in error, the very terms of the findings of the Court of Claims and of the Acts of Congress, which gave her her rights. In a word, what the plaintiff in error did, or what was done in her name, by counsel actually chosen by and representing the defendants in error, and instructed by them, was pursuant to what the defendants in error themselves denominate in their brief "the good understanding between the *cestuis que trustent* and the claimant" Esther S. Buchanan, administratrix of William B. Buchanan. (See Defendants in Error's Brief, page 8.)

This understanding and the instructions pursuant to their authority, given by the defendants in error to the plaintiff in error were consistent and continuous, and were never withdrawn or reversed until "the mistake was discovered after the filing of the bill in this cause." That is the whole case, and the Court of Appeals of Maryland claim that, upon the filing of the amended answers of the defendants in error, it had a right to "now correct the mistake" (Record, page 101), and take away from the plaintiffs in error what the defendants in error, pursuant to that understanding, had authorized her to ask and obtain from Congress for her own self equally with themselves.

III.

If, therefore, there was an express understanding, whether due to a mistake, or founded, as we have shown, upon good and equitable consideration passing between the three parties, described as entitled to the claims, what possible relation can the doctrine of an executor *de son tort*, or trustee *de son tort*, bear to the case presented here? A trustee *de son tort* is one who has acquired property in fraud or violation of the trust or understanding which exists, and which the law implies between himself and the parties entitled to the trust estate in question. It is never one who has acquired and holds the property in question pursuant to the strict terms of the trust or understanding impressed upon him or the property.

Therefore, it is respectfully contended, that all the cases referred to in the brief of the defendants in error on pages 22 to 26 of said brief, relative to the powers of a Court of Equity "to follow a trust upon property which has passed into the hands of a wrongful owner" and "convert him into a trustee for the true owner," and "compel him to convey the legal title," have no application in this case.

It need also hardly be repeated here that the cases of William vs. Heard, 140 U. S., and Butler vs. Gorely, 146 U. S., cited by the defendants in error, were cases referring to the Alabama Claims, which this Court said, in Blagge vs. Balch, were, by the terms of the Act which appropriated them, claims tantamount to property rights, transmissible in all respects as property, and totally different from these claims which were mere gratuities, gifts of grace, in which no persons had any legal rights, transmissible in any way at all. Consequently cases like the case of Johnson vs. Towsley, 13 Wall, page 72, where the Court says, "numerous cases are found in the Courts of Kentucky and Virginia, where they have, by proceedings in equity, established the junior patent to be the title instead of the elder patent," and otherwise construed the effect of the proceedings of the land office, certainly have no relation whatever to a case like the present, where the parties have no legal rights whatever, but only enjoy such gratuities as Congress has

expressly granted to the next of kin of certain designated persons. All these cases cited on page 26 of brief of defendants in error are the mere equitable construction of legal rights which the parties have obtained from Courts of limited jurisdiction or from the *executive department* of the government, but nowhere has any Court of Equity ever undertaken to disturb or set aside a *legislative grant*, given to a person or persons nominatim, or to the heirs at law or next of kin of a named person. We will not repeat the authorities on that subject.

IV.

Further, we especially call the Court's attention to the fact that when our adversaries claim (pages 33, 34 of their brief) that the plaintiff in error here went into Court to get a Court of Equity to determine as against herself, or the next of kin of her intestate, to whom Congress had made this gift, what parties were equitably entitled to it, they altogether misstate the terms of her bill in equity, and of the gift and the conditions of the gift which Congress had ordained respecting this subject matter. The bill of the plaintiff in error, in the Court of Equity below, expressly asserted, in accordance with the terms of the Act of Appropriation, that she held this fund for the benefit of the next of kin of William B. Buchanan, to whom Congress had given it as the surviving partner of the firm named in the Act and in the Findings of the Court of Claims, as well as the next of kin of the other partners. She did not ask, and she could not in law ask, that the Court should determine whether the fund should be taken away from the next of kin of her own intestate and given exclusively to the next of kin of the other partners named in her bill. (See Record, pages 11 to 15.)

When defendants in error state that such was the prayer of the bill, they misstate it to the extent of stating the very opposite, for the very prayer quoted, when taken in connection with the allegation of law in the bill, shows that it could only be to the effect that the Court "would distribute the same among the next of kin of the three partners named," according to the

Statute of Distribution of Maryland, which is plainly what was meant by the " proportion and rule of the State Court."

Moreover, the bill said, with particularity, on page 15 of record, that your oratrix is in doubt "*as to the proportion in which said beneficiaries should properly participate in the respective shares of their ancestors in said fund,*" and in paragraph 12, "is informed and does verily believe that distribution of said fund should be made in three equal parts among the next of kin of said firm of S. Smith & Buchanan."

V.

Are not our adversaries then reduced to straits when they contend, as they do, on page 34 of their brief, that no federal question was necessarily involved in the action and decision made by the Court of Appeals of Maryland in this case? If the Court of Appeals of Maryland had confined itself to granting the relief asked according to the prayer of the bill, it would have merely determined who were the next of kin of the three members of the firm to whom Congress and the Court of Claims by their joint action gave this award, and in what proportions the next of kin of the said three members, respectively, were entitled. But the Court of Appeals took up another question, viz., which of two firms was the original sufferer contemplated by implication from the terms of the Act of 1885, and decided that it was another firm than the one to whom Congress by the Act of 1899, appropriated the award, thereby expressly making and deciding a federal question, which the prayer of the bill did not ask them to decide, and which took away all the rights of the plaintiffs in error, which had been expressly alleged in the bill, and expressly admitted by the answers of the defendants in error, until the last moment when the amended answers were filed, and which rights, as we claim, were expressly given these plaintiffs in error by the Act of Appropriation of 1899. It is one of the numerous inconsistencies to which the defendants in error have been driven, when they assert in one breath that there

was no federal question involved in the decision made by the Court of Appeals of Maryland, and yet that the Court of Appeals of Maryland had the right and jurisdiction to decide, and did decide, who were the original sufferers within the terms of the Act of 1885, notwithstanding the findings and award of the Court of Claims on that subject, and the terms of the Act of gift or appropriation of Congress, March 3, 1899.

If the Court of Appeals of Maryland had limited itself to its proper duty of determining who were the next of kin of Samuel Smith, James A. Buchanan and William B. Buchanan, and to what proportions they were entitled in the right of their respective ancestors, to share in the fund, as that Court itself seemed almost to recognize as its proper function in the premises (Record, page 117), there would have been no Federal question. But as it was, they expressly undertook to construe the Acts of Congress and exclude the next of kin of William B. Buchanan from their share in the award, which was expressly granted to them as a gracious gift of Congress by the terms of the Act of Appropriation.

VI.

In their brief on page 8, the defendants in error for the first time make the suggestion that the fiduciary in this case obtained by fraud a certificate that she represented them, and that the decision of the Court of Claims was wholly *ex parte* and without notice to the beneficiaries, and this too in the face of their own repeated declarations that she *did really* represent them. (Brief for Appellees, pages 11, 14, etc.)

This is the first time that any suggestion of fraud has been made in the case. This Court will observe that the Court of Appeals of Maryland dealt with the case without discovering any suggestion of fraud or improper conduct on the part of Miss Buchanan, the plaintiff in error, and the search of the pleadings, including the amended answers of the defendants in error, disclose no such imputation, even by implication; but the pleadings do show that the defendants in error shared Miss Buchanan's belief, here insisted on, as to her own rights,

up to the moment of filing those answers, when, for the first time, they discovered their own alleged mistake, to refer again to the opinion of the Maryland Court of Appeals. No Court has ever founded fraud upon a mere insinuation, but requires it to be both plainly charged and plainly proven, to make it the foundation for relief. Such an insinuation can only recoil upon the defendants in error and illustrate the unworthiness and desperation of their contention here. But with this charge made against this lady, the plaintiff in error here, it is due to her and to this Court, to point out that the certificates obtained from the Court of Claims and thus stigmatized and claimed to be "without notice to the beneficiaries" on the brief of the defendants in error, were obtained by the application of one of the counsel, now here in this Court representing the defendants in error, and who then represented these defendants in error equally as much, and, in fact, to be arithmetically exact, twice as much, as he purported to represent this lady, the plaintiff in error.

The application, as the Court states, was made by the counsel himself, and not by the plaintiff in error, who, being a lady, was, of course, in a matter of this kind, altogether in the hands of her counsel, and controlled by him. Surely the counsel did not mean in his brief to insinuate that his application was a "fraud," or that the notice which he necessarily had of an act done by himself, was not equally notice to his clients, the defendants in error, as to his client, Miss Buchanan, the plaintiff in error. The counsel for the latter desire to state that, if he did make such an allegation concerning himself, such is their respect and esteem for him and such is their knowledge of his character, that they must refuse to credit the charge.

Also, therefore, when on pages 13 and 32, Miss Buchanan is accused of "lack of frankness" in her bill filed in the Maryland Court, and in her petitions filed in the Court of Claims, for not stating the date when her father joined the firm of S. Smith & Buchanan, it should be mentioned to the Court, that counsel for plaintiff in error here, who drew the bill, had no knowledge on the subject beyond the facts furnished by the petitions and findings and conclusions of the Court of Claims,

which petitions we have again to remark were drawn by Mr. Clark, one of the counsel for defendants in error here, and which findings and conclusions were made up in a case where he was in charge of the claimant's whole case, and presumably requested from the Court for her, the very findings which it made.

VII.

What remedy is there in any Court of law or equity for a person who alleges that a donation, purely gratuitous, was made to another person by mistake, but which that other person claims, was made to him with the most discriminating intention on the part of the donor. This is a statement of the whole case alleged by the defendants in error, reduced to its native simplicity. Is there any Court which can speak for the donor of such a gift, and declare that it was made under a mistake? From the very nature of the case, must not *the donor* be the *only tribunal* who can decide whether he made the donation to the wrong party under a mistaken belief? Therefore, is it not plain that, as a matter of natural justice, the only course by which such a controversy could be decided, is for the fund to be restored to the donor in question, before whom the two parties claiming to possess, each in his own person, the meritorious and moving cause of the gift, can appear and ask for the exercise of this grace in behalf of themselves respectively? Would there be any other way to find out whether Congress had intended, or should intend, to give the fund to one or the other of these two firms who are claiming here, than to restore it to Congress, who would hear the controversy by their own proper committee, and make the award to the firm that they chose to consider the more meritorious of the two claimants? We believe that upon a fair hearing of the equities of this case, as to where the suffering of these losses actually fell, Congress would again award the fund, as it has already awarded it, a one equal third share to the next of kin of William B. Buchanan.

Respectfully submitted,

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